

## Military FAQs – Caring for Servicemember



### **Military Caregiver Leave**

#### ***Q. What is “military caregiver leave?”***

A. Military caregiver leave is the second of the two new military family leave provisions. Such leave may be taken by an eligible employee to care for a covered servicemember with a serious injury or illness. This type of FMLA leave is based on a recommendation of the President’s Commission on Care for America’s Returning Wounded Warriors.

#### ***Q. Who is eligible to take military caregiver leave?***

A. An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember with a serious injury or illness may take job-protected FMLA leave to provide care to the servicemember.

#### ***Q. Are families of servicemembers in the regular Armed Forces eligible for military caregiver leave?***

A. Yes. Military caregiver leave extends to those seriously injured or ill members of both the regular Armed Forces and the National Guard or Reserves.

#### ***Q. Who is a “covered servicemember?”***

A. Covered servicemember with a serious injury or illness means

- A member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or otherwise on the temporary disability retired list for a serious injury or illness; or
- A veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation or therapy.

#### ***Q. Can I take military caregiver leave if I am the stepson or stepdaughter of the covered servicemember or if I am the stepparent of a covered servicemember?***

A. Yes. Under the FMLA for military caregiver leave, a son or daughter of a covered servicemember means a covered servicemember’s biological, adopted or foster child, stepchild, legal ward or a child for whom the employee stood in loco parentis and who is of any age. Under the FMLA for military caregiver leave, a parent of a covered servicemember means a covered servicemember’s biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents in-law.

#### ***Q. What is a “serious injury or illness?”***

A. A serious injury or illness is an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank or rating.

#### ***Q. How much leave may I take to care to for a covered servicemember?***

A. An eligible employee is entitled to take up to 26 workweeks of leave during a “single 12-month period” to care for a seriously injured or ill covered servicemember. The “single 12-month period”

begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

***Q. May I take FMLA leave to both care for a covered servicemember and for another FMLA qualifying reason during this single 12-month period?***

A. Yes. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

***Q. Can I carry-over unused weeks of military caregiver leave from one 12-month period to another?***

A. No. If an employee does not use his or her entire 26-workweek leave entitlement during the single 12-month period of leave, the remaining workweeks of leave are forfeited. After the end of the single 12-month period for military caregiver leave, however, an employee may be entitled to take FMLA leave to care for the covered military member if the member is a qualifying family member under non-military FMLA and he or she has a serious health condition.

***Q. Can I take military caregiver leave as the son or daughter of a covered servicemember if I am 18 years old or older?***

A. Yes. The new FMLA regulations contain special definitions for son and daughter for both of the military family leave provisions. For military caregiver leave, an eligible employee may take leave if he or she is the "son or daughter of a covered servicemember," which is defined as the covered servicemember's biological, adopted or foster child, stepchild, legal ward or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

***Q. Who is a servicemember's "next of kin" for purposes of military caregiver leave?***

A. The regulations define a covered servicemember's next of kin as the servicemember's nearest blood relative, other than the covered servicemember's spouse, parent, son or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered servicemember's next of kin. The regulations provide that all family members sharing the closest level of familial relationship to the covered servicemember shall be considered the covered servicemember's next of kin, unless the covered servicemember has specifically designated an individual as his or her next of kin for military caregiver leave purposes. In the absence of a designation, where a covered servicemember has three siblings, for example, all three siblings will be considered the covered servicemember's next of kin.

***Q. Can I take military caregiver leave for more than one seriously injured or ill servicemember or more than once for the same servicemember if he or she has a subsequent serious injury or illness?***

A. Yes. By regulation, military caregiver leave is a per-servicemember, per-injury entitlement. Accordingly, an eligible employee may take 26 workweeks of leave to care for one covered servicemember in a single 12-month period and then take another 26 workweeks of leave in a different single 12-month period to care for another covered servicemember. An eligible employee may also take 26 workweeks of leave to care for a covered servicemember in a single 12-month period and then take another 26 workweeks of leave in a different single 12-month period to care for the same servicemember with a subsequent serious injury or illness (e.g., if the servicemember is returned to active duty and suffers another injury).

***Q. Can I take additional military caregiver leave if a covered servicemember receives a serious injury or illness and then, at a later time, manifests a second serious injury or illness?***

A. Yes. If a covered servicemember incurs a serious injury or illness and manifests a second serious injury or illness at a later time, an eligible employee would be entitled to an additional 26-workweek entitlement to care for the covered servicemember in a separate single 12-month period. However, the covered servicemember must still meet the definition of covered servicemember and the second serious injury or illness must have been incurred in the line of duty on active duty. For example, an eligible employee may take military caregiver leave to care for a covered servicemember who has suffered a limb amputation in the line of duty on active duty. If that same servicemember manifests a brain injury a year later arising from the same incident, the employee would be eligible to take another 26 workweeks of military caregiver leave at that time.

***Q. Can I care for two seriously injured or ill servicemembers at the same time?***

A. Yes. However, an eligible employee may not take more than 26 workweeks of leave during each single 12-month period.

***Q. What type of notice must I provide to my employer when taking military caregiver FMLA leave because of a qualifying exigency?***

A. An employee must provide 30 days advance notice of the need to take FMLA leave for planned medical treatment for a serious injury or illness of a covered servicemember. When 30 days advance notice is not possible, the employee must provide notice as soon as practicable taking into account all of the facts and circumstances. When the need for leave is unforeseeable, an employee must comply with an employer's normal notice or call-in procedures, absent unusual circumstances.

An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide sufficient information to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

***Q. Are there certification requirements for taking military caregiver leave?***

A. Yes. When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. The U.S. Department of Labor has developed a new optional form (WH-385) for employees' use in obtaining certification that meets military caregiver leave certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness.

***Q. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for military caregiver leave and leave due to a serious health condition?***

A. The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide any requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

The regulations also permit employers to authenticate and clarify medical certifications submitted to support a request for military caregiver leave using the procedures applicable to FMLA leave taken to care for a family member with a serious health condition.

Employers are not permitted to require second or third opinions on military caregiver leave. Employers are also not permitted to require recertification for such leave.

***Q. Are private health care providers, as well as military health care providers, permitted to complete a certification for military caregiver leave?***

A. Yes. A private health care provider can complete certifications for military caregiver leave if the health care provider is either a DOD TRICARE network authorized private health care provider or a DOD non-network TRICARE authorized private health care provider. Department of Defense health care providers and Veterans Affairs health care providers can also complete a certification for military caregiver leave. *See* 29 CFR 827.310(a).

***Q. What if my covered servicemember receives a catastrophic injury and the military issues me travel orders to immediately fly to Landstuhl Regional Medical Center in Germany to be at his bedside? Do I have to provide a completed certification before flying to Germany?***

No. Given the seriousness of the injuries or illnesses incurred by a servicemember whose family receives an invitational travel order (ITO) or invitational travel authorization (ITA) and the immediate need for the family member at the servicemember's bedside, the regulations require an employer to accept the submission of an ITO or ITA, in lieu of the DOL optional certification form or an employer's own form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITO or ITA.

The regulations also permit an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered servicemember to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA.

If the covered servicemember's need for care extends beyond the expiration date specified in the ITO or ITA, the regulations permit an employer to require an employee to provide certification for the remainder of the employee's leave period.

***Q. How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?***

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The U.S. Department of Labor believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate single 12-month period for military caregiver leave.

The regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.